No. 20195

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EUGENE WEBB, JR., MARGUERITE WEBB, RICHARDS MATTHEWS, JR., ROBERT RUFI and EUGENE C. JONES,

Appellants,

vs.

BEVERLY HILLS FEDERAL SAVINGS AND LOAN ASSOCIATION, FEDERAL HOME LOAN BANK BOARD, LYTTON FINANCIAL CORPORATION, BART LYTTON, BETH LYTTON, THOMAS W. CLARKE, DR. SAMUEL J. SILLS, GLENN WILSON and H. P. BRAMAN,

Appellees.

Opening Brief of Appellants Eugene Webb, Jr., Marguerite Webb, Richards Matthews, Jr., Robert Rufi, Eugene C. Jones.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

Textbook

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Jurisdictional Statement.

This action was originally brought by Beverly Hills Federal Savings and Loan Association against the Federal Home Loan Bank Board pursuant to 12 U.S.C. 1464(d)(1), the Home Owners Loan Act of 1933, as amended, and the Federal Declaratory Judgments Act, 28 U.S.C. 2201, 2202. The court below had jurisdiction of that basic controversy. Beverly Hills Federal Savings and Loan Association subsequently amended its complaint to name individual defendants as a matter of pendent jurisdiction, although no cause of action against them was stated. The Federal Home Loan

Bank Board filed cross-claims against these individual defendants. This Court has jurisdiction of the appeal from the judgment of the court below pursuant to 28 U.S.C. 1291, 1294.

Statement of the Case.

This action was initiated by Beverly Hills Federal Savings and Loan Association (hereinafter referred to as "Beverly Hills") against the Federal Home Loan Bank Board (hereinafter referred to as "Bank Board") pursuant to Section 1464(d)(1) of Title 12, U. S. Code, after the Bank Board had made certain charges against Beverly Hills and others arising out of the transfer of control of Beverly Hills to certain new parties. The filing of the action stopped administrative hearing proceedings.

The complaint [Tr. p. 2] asked a Declaratory Judgment against the Bank Board that the transfer of control of Beverly Hills was proper. The Bank Board filed a Motion to Dismiss [Tr. p. 5] and a Notice of Pendency of Other Actions and Proceedings [Tr. p. 16] claiming that Beverly Hills had failed to join as defendants the prior officers and directors of Beverly Hills, Eugene Webb, Jr. and others, and the new officers and directors, Thomas W. Clarke, Bart Lytton and others.

The Bank Board alleged that there were indispensable parties without which the action could not proceed. [Tr. p. 5.]

Beverly Hills then filed its Amended and Supplemental Complaint [Tr. p. 36] joining Eugene Webb, Jr. and the other former officers and directors of Beverly Hills and Thomas W. Clarke, Bart Lytton and

the other new officers and directors. No cause of action was stated against these new parties and Beverly Hills continued to assert the validity of the challenged transaction.

The Bank Board then filed an Answer, Counter-Claim and Cross-Claim [Tr. p. 42] charging breach of fiduciary relationship on the part of Webb, Clarke and Lytton and those associated with them. In essence, the cross-claims charged joint participation by these parties in the transfer of control of Beverly Hills and the sale of a companion company by a trust (for the Webb children) to Lytton Financial Corporation. The Bank Board claimed that the consideration paid the trust for the stock of the companion company (The Southland Company), and the consultant fees paid to Eugene and Marguerite Webb, were in large part payment for control of Beverly Hills.

Beverly Hills had been founded, and managed, by Eugene Webb, Jr. for some 25 years. Approaching age 70, he wanted to divest himself of his responsibilities. An arrangement was made to have a long time acquaintance, Thomas W. Clarke, an attorney skilled in the savings and loan field, and at the time an attorney for Lytton, become president and general manager of Beverly Hills.

Several years before this transaction, Webb had organized the Southland Company, an escrow and insurance company, to handle escrows and insurance for Beverly Hills and other customers. At this time (and until 1964) federal savings and loan associations were forbidden by their charters to engage in these activities and it was not uncommon for officers or directors of a federal savings and loan to operate such a com-

pany. No corporate opportunity was involved and none has ever been charged. Webb transferred the stock of Southland to an irrevocable trust for his children before Southland actually began to engage in business. The trustees were Mr. and Mrs. Webb and Title Insurance and Trust Company.

At the time Clarke agreed to assume the presidency of Beverly Hills, Bart Lytton proposed to buy Southland. Webb agreed with the understanding that Clarke, and not Lytton, would control Beverly Hills. Lytton did insist, however, that he hold the proxies in Beverly Hills (presumably to protect Southland's relationship with Beverly Hills). At Clarke's insistence, Webb agreed to the transfer of proxies and the various transactions were carried out in March of 1961.

About a year later, Bart Lytton moved in and took control of Beverly Hills installing himself as President. Clarke had resigned meanwhile and one H. P. Braman was in office when Lytton took over. It now appears that Clarke never did sever his relationship with Lytton when he assumed the presidency of Beverly Hills but was acting as a front for Lytton all the time.

In making their charges with regard to these transactions, the Bank Board avoided the use of the word "conspiracy", but did allege joint participation in transferring control of Beverly Hills by unlawful means. The elements of conspiracy alleged will be detailed below so that this chronological narrative will not be disrupted.

Immediately after Webb relinquished control of Beverly Hills, the new administration attempted a transfer of some $15,000,000 in loans from Beverly Hills to Lytton Savings and Loan Association in exchange

for a similar amount of loans transferred to Beverly Hills. The terms of the transfer were such that the Bank Board stepped in and forced a rescission of the transfer. Thereafter, Bank Board examiners were in nearly constant attendance at Beverly Hills up to the date of the Judgment complained of on this appeal.

This action was filed in 1962 and dragged along with discovery proceedings and an attempted intervention and appeals thereon until late 1964. At that time Bart Lytton made a deal with the Bank Board whereby Lytton and all his cohorts were to be dismissed from this lawsuit and the Lytton interests were to get sums equivalent to everything paid for Southland and for consulting services from the Webbs, plus enough to cover taxes to be paid on this recovery. The total came to about $1,875,000. Southland ownership passed to Beverly Hills and the Lytton's turned the management of Beverly Hills over to appointees of the Bank Board.

The transaction itself was not only interesting but has substantial hearing on this appeal. Bart Lytton, acting as President of Beverly Hills, the plaintiff, and for himself individually and representing his other interests as defendants, made the deal with the Board. An amendment to the Home Owners Loan Act of 1933 was passed in 1964 permitting a federal savings and loan association to invest up to 1% of its assets in another (companion) corporation. (12 U.S.C. 1464-(c).) However, the Beverly Hills charter had not been amended to permit this. [McMurray Depo. pp. 195-198, 202-206.] Further, Beverly Hills didn't have $150.000.000 in assets to take advantage of the new law. [See Financial Report Sept. 30, 1964, McMurray Depo. Ex. 12.] So—the Federal Home Loan Bank

Board of San Francisco, as part of this settlement, loaned Beverly Hills in excess of $10,000,000 to bring its assets up to $150,000,000.

In order to generate the $300,000 to reimburse Lytton for consultants fees paid to the Webbs over the five years of their contracts, the Bank Board authorized Beverly Hills to buy some $12,500,000 in loans from Lytton Savings and Loan Association at a *premium*. The profit on this transaction also allowed an additional $75,000 to Lytton Savings to pay the taxes it would incur in recouping the $300,000 (which, incidentally, had been originally paid by Lytton Financial Corp. and not Lytton Savings).

Lytton and Beverly Hills then prepared a so-called "Stipulation for Settlement and Entry of Judgment of Dismissal" [Tr. p. 105] and a "Judgment of Dismissal" [Tr. p. 112] which they presented to the Court below in utmost secrecy and with no notice to the remaining defendants, the Webbs and their former co-officers and directors. After the Court pointed out the conflict of interests of Bart Lytton stipulating on behalf of plaintiff Beverly Hills and on his own behalf as defendant, the parties went out and in less than twenty-four hours rounded up a new Board of Directors for Beverly Hills chosen by the Bank Board. They then took the Stipulation and Judgment to the Court authorized by the new Board of Directors. Bart Lytton and his associates were also given a Covenant Not to Sue, executed by the new Board of Directors of Beverly Hills, absolving them of any claims arising out of their conduct of the management of Beverly Hills.

The so-called Stipulation only revealed the dismissal of the Lytton parties, the purchase of Southland by Beverly Hills and certain details relating to transfer of control. The other financial factors mentioned above were not disclosed. [See Reporter's Transcript for January 13 and 14, 1965.] The Court below refused to endorse the Stipulation but permitted the simple dismissal.

Not only was no notice given of these *ex parte* proceedings, but the reporter's notes were sealed and the parties avoided any disclosure to counsel for *amicus curiae* in this case who happened to be in the Judge's courtroom at the time the Lytton attorneys, Bank Board attorneys and Bart Lytton himself left the Judge's chambers. [Rep. Tr. Vol. III, p. 18.] Counsel for the Webbs learned of the settlement after Lytton and the Bank Board provided the press with press releases following the entry of the Judgment of Dismissal. Webb's attorneys were never served with any of the documents filed and obtained the same only after requesting them after reading in the newspapers of the dismissals.

Specification of Errors.

1. The Court erred in dismissing defendants and cross-defendants Lytton Financial Corporation, Bart Lytton, Beth Lytton, Thomas W. Clarke, Samuel J. Sills, H. P. Braman and Glenn Wilson.

2. The Court erred in not dismissing *all* defendants and cross-defendants who were alleged to be co-conspirators with the parties dismissed.

3. The Court erred in not dismissing defendants and cross-defendants Richards Matthews, Jr., Robert G. Rufi and Eugene C. Jones, who were alleged to be co-conspirators with the parties dismissed.

4. The Court erred in granting a Judgment of Dismissal after court proceedings of which these defendants and cross-defendants received no notice or knowledge, and at which defendants and cross-defendants were not present.

Issues on Appeal.

The Specification of Errors can be refined to two basic issues:

I.

The propriety of the dismissal of all but one alleged conspirator without dismissal of the remaining alleged conspirator.

II.

The propriety of the clandestine court proceedings where the alleged co-conspirators were dismissed in utmost secrecy and with no notice to the remaining defendants.

In this approach we would like to comment that Specification of Errors 2 and 3 are separately stated because certain defendants, namely Matthews, Rufi and Jones, were not parties to any of the transactions or considerations and merely cast votes of approval as directors on the acceptance of resignations of directors and election of new ones. They are not alleged to have received any of the funds allegedly paid for control of Beverly Hills. To this extent their positions and those of Mr. and Mrs. Webb are dissimilar.

Summary of the Argument.

In the Argument herein, we have pointed out (1) that the pleadings by the Bank Board, though deliberately devoid of any use of the term "conspiracy", do in fact allege a conspiracy by Bart Lytton and his associates on the one hand (all acting through Thomas W. Clarke and Bart Lytton) and Eugene Webb, Jr. and his associates on the other (all acting through Eugene Webb, Jr.); (2) that the Webbs, and their associates, all acting on behalf of Beverly Hills, as officers and directors thereof, should be treated as a single (alleged) conspirator; (3) that one may not conspire with himself; (4) that where all the alleged co-conspirators but one have been dismissed from a lawsuit, conspiracy charges against the remaining alleged sole conspirator cannot be sustained because there is no longer a conspiracy; and, finally, (5) the clandestine procedure in Court without notice to, or knowledge by, the non-dismissed defendants, and the denial of the right of these defendants to be heard was grossly unfair and a manifest miscarriage of justice.

ARGUMENT.

I.

It Was Improper for the Court Below to Dismiss All but One of the Alleged Co-Conspirators Without Dismissing the Remaining Alleged Conspirator.

A. The Elements of Conspiracy Alleged.

At the outset this Court should note that all the affirmative claims of wrongdoing in this case are those by the Bank Board in its Answer, Counter-Claim and Cross-Claims. [Tr. p. 42.] The prayer of the Bank Board asks for certain disciplinary measures against all of the cross-defendants. While the Bank Board also purports to ask for monetary relief, by so doing it alleges a cause of action in which it has no legal interest, *i.e.,* it can't claim damages for someone else—Beverly Hills. To assert a valid claim for damages, the Bank Board should have appointed a conservator or receiver to sue on behalf of Beverly Hills, something the law (12 U.S.C. 1464(d)) provided for but which the Board elected not to do.

Nevertheless, the charges actually allege a conspiracy although that term is never used.

The following allegations we believe constitute an over-all claim of conspiracy.

1. Charging defendants Webb, Matthews, Rufi and Jones with "participating in the furtherance and accomplishment of an agreement to elect and maintain certain designated persons in office as Officers and Directors of the Association . . ." [Tr. p. 48, par. (i), p. 7.] (Also alleged in Board Resolution 15,430, p. 5, par. (b) [Tr. p. 23] and in Resolution 15,703, p. 5, par. f [Tr. p. 31].)

2. The allegation that these acts were "unlawful." [Tr. p. 49, par. (j), p. 8.]

3. Allegations coupling transfer of control of the Association with the sale of Southland [Tr. p. 49, par. K, p. 8] thus completing the elements of conspiracy of persons acting in concert to do a lawful act by unlawful means.

4. Similar allegations that the Lyttons "participated in and encouraged" certain acts such as alleged purchasing of directorships and proxies in Beverly Hills, and inducing and benefiting in breaches of trust by the Webbs and their associates. [Tr. p. 49; par. (1), p. 8.]

5. Allegation that substantially all of the sale price for Southland ($1,500,000) and the $120,000 then paid the Webbs under the Personal Service Agreement "was agreed to be paid in the transfer of control of plaintiff Association, including the transfer of proxies and the directorships." [Tr. p. 55, par. 13, p. 14.]

6. Allegation that Lytton Financial Corporation "participated in the consummation of the breaches of trust of the then directors and managing parties . . ." (Eugene Webb, Jr. and associates.) [Tr. p. 66, par. 14, p. 25.]

This allegation is also found in Charge I(b) of Resolution 15,703. [Tr. p. 30.]

7. Finally, there is the charge that the Lyttons . . . "are *equally at fault* for violation of law and the regulations of this Board in the reconstituting of the Board of Directors of Beverly Hills Federal Savings and Loan Association, the purchasing of directorships and the sale of proxies *with*

the Webbs and the former Board of Directors of Beverly Hills Federal Savings and Loan Association, *since they participated in and encouraged these* respective *transactions.*" (Emphasis added.) [Tr. p. 31, par. (e).]

See also Charge III of Resolution 15,703. [Tr. p. 31.]

8. It should also be noted that the Bank Board alleged that the Webbs and their associates and Lytton and his associates were *indispensable parties* at the time it forced the joinder of these defendants by its Motion to Dismiss. [Tr. p. 5.]

It is submitted that these allegations state all the classic requirements for a conspiracy.

15 C.J.S., Conspiracy §1, p. 996.

"A civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish some purpose not in itself unlawful by unlawful means."

All the elements of this definition are met in the Bank Board pleadings, *i.e.,* concert of action (alleged as joint participation and agreement), a lawful purpose (transfer of control of Beverly Hills), by unlawful means (alleged receipt of consideration and profit for the transfer of control).

While the appellees will contend that no conspiracy is alleged, the pleadings belie this claim.

B. The Webbs and Their Associates Constitute a Single Alleged Conspirator.

Eugene Webb, Jr., Marguerite Webb, Richards Matthews, Jr., Robert G. Rufi and Eugene C. Jones were all officers and directors of Beverly Hills, a savings

and loan association. Eugene Webb, Jr. negotiated the transfer of control of Beverly Hills and the others carried out the transaction by Board of Directors' action of having the old directors resign and new ones appointed.

Where officers and directors act on behalf of a corporation, they are considered a single entity or single conspirator.

Packaged Programs, Inc. v. Westinghouse Broadcasting Co. (1957), D.C. Pa., 156 F. Supp. 76, 78, holding that a corporation cannot conspire with itself. In that case it was charged that Westinghouse, "through its agents, servants or employees" had conspired. The court (at p. 78) quoted from *Nelson Radio & Supply Co. v. Motorola* (5 Cir. 1952), 200 F. 2d 911, 914, as follows:

> "A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation. Here it is alleged that the conspiracy existed between the defendant corporation, its president, Calvin, its sales manager, Kelly, and its officers, employees, representatives and agents who have actively engaged in the management, direction and control of the affairs and business of defendants."

In *Johnny Maddox Motor Co. v. Ford Motor Co.*, D.C. Tex. (1960), 202 F. Supp. 103, it was alleged that:

> "Ford Motor Company, through its officers, agents, employees or representatives, and through corporations, franchises, or divisions thereof over which defendant exercised control engaged in a conspiracy. . . ."

United States v. Carroll (D.C.S.D. N.Y. 1956), 114 F. Supp. 939, 942, the court said:

> "It is true that corporations have been held to be parties to a conspiracy . . . (citing cases). . . . However, in all such cases, one corporation had been in concert with another or with individuals who were not members of the corporation."

The court then cited *Nelson* for the proposition that a corporation may not conspire with itself.

Accord:

April v. National Cranberry Association, D.C. Mass. 1958, 168 F. Supp. 919.

While these cases do not deal directly with directors as such, the principle enunciated should equally apply. *All* the Beverly Hills directors are charged here with joint action (and therefore as corporate action) in transferring control of Beverly Hills. As such, they *are* the corporation which cannot conspire with itself.

C. There Must Be More Than One Conspirator.

With dismissal of all the defendants except the Webbs and their associates, only one alleged conspirator remains in this litigation.

> "To constitute a conspiracy there must be a combination of two or more persons; one person cannot conspire with himself."
>
> 15 C.J.S., Conspiracy, §2, p. 997.

As Judge Learned Hand stated in *Reitmeister v. Reitmeister,* C.C.A. 2 (1947), 162 F. 2d 691 at 696:

> "Now it is as much a rule governing a civil action for conspiracy as a criminal prosecution, that there must be two conspirators . . ."

The court affirmed a dismissal as to the remaining conspirator after the other conspirators had been dismissed.

In accord see:

Keppleman v. Upston, D.C.N.D. Calif. (1949), 84 F. Supp. 478, 480 (Judge Harris);

Johnny Maddox Motor Co. v. Ford Motor Co., D.C. Tex. (1960), 202 F. Supp. 103;

Elliott v. Paramount Film Distributing Corporation, E.D. Penn. (1961), 27 F.R.D. 495.

D. An Action Having Only One Conspirator Must Be Dismissed.

The clearest statement on this point is found in *Elliott v. Paramount Film Distributing Corporation,* E.D. Penn. 1961, 27 F.R.D. 495, where the court said:

> "In the present posture of the case, there is only one defendant. It is basic law that 'to constitute a conspiracy there must be a combination of two or more persons; one person cannot conspire with himself. Furthermore, there must be a preconceived plan and unity of design and purpose, for the common design is of the essence of the conspiracy.' 15 C.J.S. Conspiracy §2, p. 997. Having withdrawn their complaint against the distributor defendants with prejudice, there is no one left with whom the exhibitor defendant could have conspired. . . ."

Less clearly stated because of the way the case developed, Judge Learned Hand reached the same result in affirming the lower court's dismissal of the single remaining conspirator in *Reitmeister v. Reitmeister,* C.C.A. 2 (1947), 162 F. 2d 691 at page 695, 696.

These cases are on all fours with our present case.

E. The Court Below Erred in Either Not Refusing to Allow the Dismissal of the Co-Defendants or in Failing to Dismiss the Remaining Defendants.

The court below dismissed the co-defendants at a clandestine *ex parte* hearing where the appellants were denied notice and the opportunity to be heard. In light of the foregoing authorities it is submitted that the court should have dismissed all defendants or none of them.

II.

It Was Improper to Conduct Clandestine Court Proceedings Where the Alleged Co-Conspirators Were Dismissed in Utmost Secrecy and With No Notice to the Remaining Defendants.

Appellants assure this Court that the use of the terms "clandestine" and "utmost secrecy" are no exaggeration as the record will clearly reveal.

On January 13, 1965, counsel for Beverly Hills, counsel for Bart Lytton, Lytton Financial Corporation and the other Lytton defendants, counsel for the Bank Board, Thomas C. Clarke, Bart Lytton and Joseph McMurray, Chairman of the Bank Board were heard in the chambers of the court below in an *ex parte* proceeding. [Rep. Tr. Vol. II, p. 7.] [Also note appearances recorded at beginning of Rep. Tr. Vol. II (both days), showing appellant's counsel not present.]

According to the court [Rep. Tr. Vol. 3, p. 8] all the proceedings, both in chambers and subsequently in court, were reported and are contained in the Reporter's Transcript. In this the Court appears to be mistaken as shown by the opening remarks reported on page 3 of Volume II of the Reporter's Transcript. The first statement made indicates a prior discussion by its very

nature. The record, such as it is, reveals no inquiry by the court as to notice to appellants or as to their absence.

In any event, although the Court ultimately granted the Judgment of Dismissal only, and refused to endorse the Stipulation for Settlement, the interests of appellants were discussed throughout the hearing [Rep. Tr. Vol. II] although they were not afforded the right to be present.

The hearings were intended to be secret as the actions of the parties indicated. Mr. Corinblit, counsel for *amicus curiae* (and attempted intervenors in this case) stated in open court [Rep. Tr. Vol. 3, p. 18] that he encountered these counsel in the court's anteroom and that they made no mention of their mission there or that his case was under discussion with the Court. He asked one attorney about it, "but I got a kind of ambiguous answer."

After the hearings, conducted on two successive days, the court ordered the reporter's notes sealed [Rep. Tr. Vol. II, pp. 28, 34], and finally unsealed them effectively twenty-four hours after the Judgment was signed. [Rep. Tr. Vol. II, pp. 41, 42.]

The court later explained to counsel for appellants that he had protected their interests by not signing the Stipulation for Settlement and by amending the Judgment of Dismissal to provide that the rights of remaining parties were preserved. [Rep. Tr. Vol. 3, p. 6.]

The unfortunate part was that the Stipulation for Settlement omitted all the really questionable parts of the deal between Bart Lytton and the Bank Board and while the court may have "smelled a rat" when he re-

fused to endorse the stipulation, appellants believe he never was apprised of the full nature of the transaction.

Instead of the judgment "protecting" the interests of the appellants, all it did was leave appellants as the sole defendants and let the Lytton defendants go "scot-free." All rights against appellants were specifically preserved. The so-called "preservation" of non-existent rights of appellants was of little consolation.

At the time of the settlement, Bart Lytton was President of plaintiff Beverly Hills, an officer or director of defendant Lytton Financial Corporation, and was an individual defendant. As such he represented both the plaintiff and certain defendants in his dealings with defendant and cross-complainant Bank Board.

Far from the interests of appellants being protected by the Judgment of Dismissal, very drastic changes have taken place in the complexion of this lawsuit which are highly prejudicial to the appellants.

By the settlement agreement, the Board of Directors of Beverly Hills resigned and a new Board, all chosen by the Bank Board, have taken control. Whereas, the first Amended and Supplemental Complaint of Beverly Hills contended that the Bank Board charges were unfounded and that appellants were not guilty of any wrongdoing, the new alignment since the dismissal has Beverly Hills (by a Second Amended and Supplemental Complaint) now contending that appellants are at fault and claiming $1,800,000 under a theory of constructive trust. Originally, these claims were made only by the Bank Board, which had a doubtful right to recover against appellants. Now, Beverly Hills, if it can sustain basic jurisdiction under 12 U.S.C. 1464-

(b)(1) has a direct claim. Instead of being participants in a concerted defense to the Bank Board claims, appellants have been left "holding the bag" while Lytton gets off clear and with a big profit.

The deposition of Joseph McMurray [Depo. pp. 84, 85, 89, 90], then Chairman of the Bank Board, clearly reveals that Bart Lytton's operations at Beverly Hills were of great concern to the Bank Board and that they were prepared to do almost anything to get him out of control. McMurray [Depo. pp. 84, 85, 89, 90, 141, 142] revealed how Lytton had been taking big salaries, and charging off unusually large expenses and contributions to his philanthropies.

The stage was then set for Lytton to propose a settlement [See Ex. 7 to McMurray Depo.] whereby Beverly Hills would buy Southland from Lytton Financial Corporation for $1,500,000, the amount paid the Webb children's trust. This was despite the fact that the Bank Board had claimed that the original price paid for Southland was actually for control of Beverly Hills and not the value of Southland and despite the fact that Lytton had reaped profits and salaries from Southland for four years.

Beverly Hills (1) didn't have authority under its charter to buy Southland [McMurray Depo. pp. 195-198, 202-206], and (2) did not have sufficient assets to meet the requirements of the 1964 Amendment to 12 U.S.C. 1464. [See last page of Ex. 10 to McMurray Depo.] The Bank Board ignored the first legal obstacle and had the Federal Home Loan Bank of San Francisco loan Beverly Hills in excess of $10,000,000 [McMurray Depo. p. 211] to increase its assets sufficiently to be able to pay out $1,500,000 as 1% of its

assets and to provide the funds to buy loans from the Lytton Savings and Loan Associations.

Lytton then asked for the $300,000 paid to the Webbs under a Personal Service Agreement for consultants' services which had already been performed. To obtain this windfall, Lytton proposed that his Lytton Savings and Loan Associations sell some $12,500,000 in notes to Beverly Hills at a premium. This sale was also to provide an additional $75,000 to cover the taxes Lytton Savings would have to pay on the $300,000 windfall. [Ex. 7 to McMurray Depo.]

Quite clearly, Bart Lytton and the Bank Board very cavalierly used Beverly Hills assets to make their deal.

The actions of the Bank Board are questionable at best when it is recalled that the Bank Board had always contended that Lytton was "equally at fault" [Tr. p. 31, par. (2)] in the whole original transaction. In fact, the sequence of events, with Clarke appearing to be an independent actor and then turning Beverly Hills over to Lytton, gives rise to the implication that Lytton was the prime culprit in the whole transaction.

The only part of these financial transactions revealed in the stipulation presented to the court for approval was the $1,500,000 purchase of Southland. Lytton asked for and got two additional concessions: (1) a Covenant Not to Sue, giving him a clean bill of health on his Beverly Hills operation, and (2) the right to issue his own press release in the name of the Bank Board praising his operations at Beverly Hills. [McMurray Depo. Ex. 7.]

At the first day of the hearing at which the Judgment of Dismissal was signed, the Court pointed out

the conflict of interest wherein Lytton was acting for both Beverly Hills as plaintiff and himself and his interests as defendants. [Rep. Tr. Vol. II, pp. 25, 26.] As a result, the Lyttons and Bank Board went out that evening (the proceedings had started at 4:40 P.M.) [Rep. Tr. Vol. II, p. 3], rounded up a new Board of Directors for Beverly Hills, gave them some kind of a briefing [McMurray Depo. pp. 113-115, 123-130, 134, 138-141, 173, 174] and had them approve the agreement at about 5:00 A.M. the next morning. [Rep. Tr. Vol. II, p. 40.] At 9:00 A.M. they were back in court. [Rep. Tr. Vol. II, p. 37.]

It is the appellant's contention that this entire transaction was not only a fraud against the shareholders of Beverly Hills in the misuse of its funds to buy off Bart Lytton, but was carried out in such a manner as to be grossly unfair to appellants by conducting hearings vitally important to appellants, in secrecy, and without an opportunity to be heard reaching a result unfair to the appellants. Where the federal government is a party claiming two parties conspired in a manner affecting federal government regulatory powers, it is just not fair, equitable, or proper to dismiss out one of the parties, leaving a single group of defendants unless the government gets something in return. While McMurray sought to justify the dismissal of the Lyttons on the basis of need to remove the Lyttons from control of Beverly Hills, the "settlement" was actually a complete abandonment and whitewash of all claims by the government against the Lyttons. The extraordinary consideration given to Lytton's demands for settlement and the excessive amounts paid out of Beverly Hills assets at the direction of the Bank Board leaves the

entire transaction highly suspect and with a clear aura of impropriety. In permitting a dismissal under these circumstances, appellants submit that the court greatly abused its discretion in conducting this hearing and, as stated in Part I of this Argument, should have insisted upon, or ordered, the dismissal of all remaining defendants.

There is no question as to the clandestine and secret conditions under which those hearings were held. Had the appellants been afforded the opportunity to appear, and to expose the fraud being perpetrated on the court, the result might well have been different. When the court later denied the Motion to Vacate or in the Alternative to Dismiss, it still did not have before it the full details of the transactions as revealed in the McMurray deposition. [Deposition filed June 24, 1965; Motion Denied March 25, 1965.]

The court has intimated that the Judgment of Dismissal may have destroyed future jurisdiction as against these appellants [Rep. Tr. Vol. II, pp. 37, 39], but that hardly excuses the failure to take positive action at the time of these hearings.

Conclusions.

It is respectfully submitted that as a matter of law the Judgment of Dismissal should be reversed, or, in the alternative, that the appellants be dismissed from the action.

As a matter of fairness and equity, if the appellants are not dismissed out of the action, the Judgment of Dismissal should be reversed because of the frauds perpetrated on the court and the court's abuse of discretion and sense of fair play in conducting a secret hear-

ing where matters highly prejudicial to appellants were decided and where they were deliberately denied, and deprived of, the right to be heard.

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MAX DEUTZ